



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TOPICLEAR Inc.,

Petitioner,

v.

K & N DISTRIBUTORS,

Registrant.

86150936  
 Cancellation No. 9206923  
 92062923  
 Registration No. 4,818,656

**MOTION TO COMPEL**

**(Interrogatory Answers)**

Petitioner hereby respectfully moves the Honorable Board for an Order compelling the Registrant to submit full and proper responses to certain interrogatories pursuant to appropriate discovery requests properly served upon its attorney on March 21, 2016. A copy of the discovery request and Registrant's Answers to selected interrogatories is attached hereto.



**06-22-2016**

This Motion is brought under the provisions of 37 C.F.R. §2.120(e) and TBMP §523.01. A good faith effort has been advanced by the undersigned by e-mail letters dated May 12, 2016 and June 13, 2016 in order to obtain the required interrogatory answers (copies enclosed). However, counsel for Registrant has failed to respond to these communications.

Registrant provided answers to some of the interrogatories, but the response was not submitted under oath as required by Fed. R. Civ. Pro. 33(b)(3).

Attention is directed to the responses to interrogatories Nos. 7, 8, 12, 13, 15, 16, 17, 18, and 19. In each instance the response provided was "Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter."

Most of these interrogatories seek very basic information necessary for the prosecution of this case such as; the date of the first shipment of the goods by Registrant, the name of the first customer for the goods, whether the goods have been shipped to stores in the United States, the

names of five current customers, who is the actual manufacturer of Registrant's goods, etc.

Such interrogatories as No. 16 relating to Registrant's packaging labeling can be easily answered by merely looking at the product.

Interrogatory No. 17 merely seeks information about any advertising and interrogatories Nos. 18 and 19 refer to two companies whose names and logos appear on Registrant's packaging and it is ludicrous to respond that Registrant is working to determine information.

Registrant's evasion of providing prompt answers as required by law is an unreasonable attempt to prevent the Petitioner to obtain basic information concerning the Registrant and its products which are involved in this Cancellation.

This type of boilerplate response to legitimate interrogatories should not be permitted and should be sanctioned by the Board.

Accordingly, since the discovery sought is essential to the proper prosecution of this case, an Order requiring the Registrant to respond to the Discovery requests as put without objection is solicited.

Respectfully submitted,



Donald L. Dennison  
Attorney for Petitioner  
LADAS & PARRY LLP  
1727 King Street  
Suite 105  
Alexandria, VA 22314  
(703) 837-9600 Ext. 15

### **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Motion to Compel was sent by first class mail with proper postage affixed and e-mail, this 22<sup>nd</sup> day of June, 2016 to counsel for Registrant, Matthew H. Swyers, 344 Maple Avenue West, Suite 151, Vienna, VA 22180 and mswyers@thetrademarkcompany.com



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Donald L. Dennison

3. Identify the general nature of the business of Registrant.

**Response:** Registrant is a distributor of cosmetic products.

4. Identify all goods manufactured, sold or distributed by Registrant by type and indicate what trademarks or service marks are used for each class of goods listed.

**Response:** Registrant provides cosmetic products under the marks TROPIC CLAIR PLUS and AFRICAN CLAIR FORMULA.

5. Identify each agent or employee of Registrant responsible for, authorized or permitted to select, designate or reject a particular trademark for Registrant's goods within the last five years, and also each person regardless of whether or not employed by Registrant, who has participated in the selection of the trademark "TROPIC CLAIR PLUS" for Registrant's goods.

**Response:** Jean Robert Cesar, owner of K & N DISTRIBUTORS, LLC, 12421 Equine, Wellington, Florida 33414.

6. Identify samples of documentary evidence relating to Registrant's use of its mark, "TROPIC CLAIR PLUS", on any goods manufactured, sold or distributed by Registrant prior to the date of first use as set forth by Registrant in its Statement of Use in the application which matured into the registration of its mark here sought to be canceled.


**Response:** See Registrant's Responses to Petitioner's First Set of Requests for Production of Documents.


7. With regard to the alleged first date of use of Registrant's trademark, "TROPIC CLAIR PLUS, as set forth in its registration, indicate:

- a. the date of the first shipment of goods in the United States bearing the mark;
- b. the nature of any documentation which relates to such shipment and/or sale;

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- c. the name and address of the customer for the first shipment of such goods.
- d. the date when Registrant's "TROPIC CLAIR PLUS" goods were first imported into the United States if they were manufactured abroad.

 **Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

8. Have any of Registrant's "TROPIC CLAIR PLUS" goods ever been sold and shipped to stores in the United States, and if the answer is affirmative, provide the names and addresses of at least  five such stores.

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

9. State the date and circumstances under which Registrant first selected "TROPIC CLAIR PLUS" as a trademark for its goods.

**Response:** Registrant selected the mark on or prior to December 23, 2013 which is the filing date of the underlying Application for Registrant's Mark.

10. Prior to the filing of its application for Registration, did Registrant conduct any searches or surveys to determine if the proposed mark "TROPIC CLAIR PLUS" was available for use and free of conflict, and if the answer is affirmative, indicate the person or agency that conducted such a search and whether or not Petitioner's "TOPICLEAR" mark was cited in any search report.

**Response:** Yes. See Registrant's Responses to Petitioner's First Set of Requests for Production of Documents.

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11. Did Registrant have knowledge of the business of Petitioner and of Petitioner's mark, "TOPICLEAR", prior to the filing of its application to register the mark "TROPIC CLAIR PLUS?"

**Response:** No.

12. List 5 representative current retail store customers who have purchased "TROPIC CLAIR Plus goods manufactured, sold or distributed by Registrant within the past 6 months.

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

13. Did the Registrant know either Symcha Horowitz or John Graterol prior to the filing of its application resulting in the registration here in issue?

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

14. Does the registrant contend that skin and hair products are not considered as cosmetics?

**Response:** Yes.

15. Who is the manufacturer of Registrant's "TROPIC CLAIR Plus goods and where are they located?

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

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16. If the goods noted in Interrogatory No, 15 are manufactured abroad, is there any notification of the country of manufacture on the product or its packaging?

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

17. Have Registrant's "TROPIC CLAIR PLUS" products ever been advertised in any periodicals or other media, and if affirmative, identify each such periodical, or other media form?

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

18. Are you aware of a company called Nature Cosmetics LLC?

(a) if the answer is affirmative state the address of that company and indicate what, if any, relationship you had or presently have with that company.

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

19. Are you aware of a company called R&B Cosmetics Ltd?

(a) if the answer is affirmative state the address of that company and indicate what, if any, relationship you had or presently have with that company.

**Response:** Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial in this matter.

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**Dennison, Don**

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**To:** mswyers@thetrademarkcompany.com  
**Subject:** Cancellation #92062923 Topiclear vs. K&N

June 13, 2016

Dear Mr. Swyers:

I have not had a response from you to me communication of May 12<sup>th</sup> regarding documents available for inspection and the unsatisfactory responses to some of our interrogatories. We would really like to move ahead with this case and I request some response from your office. Otherwise I will have to file a Motion to Compel.

Sincerely,

**Don Dennison**  
**Attorney at Law**  
Partner



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## **Dennison, Don**

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**From:** Dennison, Don  
**Sent:** Thursday, May 12, 2016 11:39 AM  
**To:** mswyers@thetrademarkcompany.com  
**Subject:** Can. #92062923 Topiclear v. K&N  
**Attachments:** img-160512101153.pdf

May 12, 2016

Please see the attached letter

Don Dennison  
Attorney at Law  
Partner

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**Donald L. Dennison**  
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**INTELLECTUAL PROPERTY LAW**

May 12, 2016

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Matthew H. Swyers  
344 Maple Avenue West  
Vienna, VA 22180

Re: Topiclear, Inc. v. K & N Distributors  
Cancellation #92062923  
Your File: 27572 My File: C15675699

Dear Mr. Swyers:

I now have in my possession a large number of documents that are responsive to your Request for Production of Documents in this case.

They are available in my office for inspection, or optionally, we can copy them at your expense and forward them to you. Please let me know how you wish to proceed.

I note that your client's responses to our first set of interrogatories in nine instances stated that "Registrant is working to determine what, if any, information it retains and will supplement this response at a reasonable time prior to trial...".

This response is unsatisfactory and even in some case ludicrous. Your client's packaging shows reference to R&B Cosmetics Ltd. and Nature Cosmetics LLC, yet K & N apparently has no information regarding their awareness of these companies.

These interrogatories were served on March 21, 2016 and I would certainly think that your client would by now be able to respond to these questions.

Very truly yours,

Donald L. Dennison

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